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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 894

ALLAN C. CAIN AND MARGARET S. CAIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals as amended is reported at 298 F. 2d 934. (Pet. App. 10-16.)

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1962 (Pet. App. 8). Petition for rehearing was denied on March 12, 1962 (Pet. App. 17). The petition for a writ of certiorari was filed on April 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

[1] Record references to petitioners' brief and appendix in the Court of Appeals will be designated "BR." and "A.", respectively. Record references to the Government's appendix in the Court of Appeals will be designated "R.".

QUESTIONS PRESENTED

1. Whether it was error for the trial court to apply the right-wrong, irresistible-impulse test in determining the criminal responsibility of petitioner Allan C. Cain.

2. Whether there was sufficient evidence to support the trial court's finding that petitioner Allan C. Cain was legally sane during the years involved in the indictment.

3. Whether petitioner Margaret S. Cain was deprived of a fair trial.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> (26 U.S.C. 1958 ed., Sec. 7201.)

STATEMENT

1. On January 18, 1960, a four count indictment was filed against petitioners in the United States District Court of the Eastern District of Wisconsin, charging them with wilful attempts to defeat and evade their income taxes for the years 1953 through 1956, inclusive, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954 (A. 5–8). Petitioners' reported and correct net income and tax liability as alleged in the indictment are as follows:

Year	Reported		Correct	
	Income	Tax	Income	Tax
1953	$6,730.17	$1,015.96	$20,168.61	$6,438.84
1954	8,245.53	1,409.74	20,075.79	8,931.58
1955	6,784.16	1,148.51	14,624.09	3,174.28
1956	7,926.95	1,399.92	17,481.49	3,901.45

The right to a trial by jury was waived, and, after a trial before Judge Luther M. Swygert, petitioners were found guilty on all counts (A. 252). On May 4, 1961 they were sentenced to imprisonment for one

year on each count, the sentences to run concurrently, and each was fined a total of $2,000 (A. 269-271).

2. The evidence to support the verdict of guilty may be summarized as follows:

A. Petitioner Allan C. Cain is a Wisconsin lawyer. He and petitioner Margaret S. Cain were married in 1934 and she has, since that time, been his full-time secretary (R. 225-226). In 1957 revenue agent Boldt began an investigation of petitioners' 1955 joint income tax return (R. 102). At the initial interview with Agent Boldt, petitioner Allan C. Cain stated that a check of his records disclosed that gross receipts for the year 1955 had been understated by approximately $12,000 (R. 104); that income for other years had also been understated (R. 109); and that he had about $20,000 available with which to settle his tax liabilities (R. 108). At this and subsequent conferences, petitioner stated that "he knew the returns were wrong all the time," (R. 118), and that, although he had contemplated hiring an accountant to straighten out his books (R. 109), he "just didn't do anything about it" (R. 118).

Petitioner revealed that prior to 1945 he had kept a book recording his professional receipts, but had discontinued this practice since he "didn't have an office girl" and "it was just too convenient to not keep up the book" (R. 119). After 1945, the only records kept by petitioners consisted of bank statements, cancelled checks and stubs, and a book that contained some duplicate bank deposit slips (R. 105, 111). While these records were utilized by petitioners in computing deductions on their 1953 to

1956 returns (R. 300), they were not used to establish the amount of annual gross receipts, which figure was arrived at by the following procedure described by Mrs. Cain:

> Well, I would say to Mr. Cain, we'll have to get our income tax out and I would come in the room and he'd say, do you think we made more this year than last and it would just be an estimate [R. 299]. * * * I know we estimated the income, and I would take the bank balance we had left at the end of the year and estimated what we might have taken in, and added that to it, but I'm just not too clear on that [R. 222].

When asked by Special Agent Sanderson whether they had "any basis at all for estimating that figure" (gross receipts), Mrs. Cain replied "No, I wouldn't say we did" (R. 299). Allan C. Cain made the following statement during the agent's investigation (R. 257):

> [T]hese returns were based on an estimated income and not from any particular records whatsoever. The only records that might have been used would be on expenses. Mrs. Cain would hurriedly go through a checkbook and determine the rent payments or maybe twelve telephone accounts that we had paid, pay them once a month, and she would do that from the expense standpoint. There were some records that way; but no records on income, absolutely none whatsoever.

Petitioners estimated gross receipts to be $9,438.16 in 1953* (A. 238), $15,685.95 in 1954 (R. 243),

$11,370.05 in 1955 (R. 247), and $13,454.39 in 1956 (R. 294). Special agent Sanderson, after noting that these amounts did not "appear to be an estimated figure," asked petitioner Allan C. Cain (R. 294):

> Q. * * * Would you have any idea how you arrived at those odd dollars and cents on there?
>
> Mr. CAIN. No sir, I wouldn't say how I arrived at the odd dollars and cents other than to say if you took—no, I can't account for that, Mr. Sanderson.

Based upon the "net worth" method of reconstructing income, it was established that petitioners' tax deficiencies for the four year period (1953–1956) amounted to $19,946.10 (R. 135–139).

B. At the trial, to support the defense of insanity, petitioner Allan C. Cain elicited the testimony of his family doctor (R. 140), a neurologist (R. 142), a clinical psychologist (R. 165) and two psychiatrists (R. 181, 203). The findings and conclusions of these medical witnesses were fairly summarized by the Court of Appeals as follows (Pet. App. 13):

> Allan Cain during 1953 through 1956 was not competent to form a criminal intent in filing income tax returns. He had then an organic brain disease complicated by emotional stress due to family tragedy and fear that he was doomed by cancer. He suffered from "confusion, grief, worry and fear" and was incapable of dealing with severe emotional and psychological stresses. He knew the difference between right and wrong in some areas but not in others, and was incompetent in matters of "judgment, finely integrated thought patterns and memory, concentration * * *." It was doubt-

> ful whether he could determine right from wrong in income tax matters. He might be conscious of wrongdoing but have no choice. He could perform only the mechanical parts of law practice and his ability to handle defense of a murder case was doubtful.

When the medical witnesses were confronted on cross-examination with the fact that petitioner had, during the relevant years, handled about fifty court cases a year, including criminal, divorce, and personal injury trials, the response was that these were "mechanical things" which petitioner was able to perform (A. 129–130, 148), "but the more complex, the more novel, the more involved, the more different from ordinary this situation becomes, his ability to handle it is diminished proportionately, and especially if you get into problems involving mathematics" (A. 148). Dr. Hurley thought that it was entirely consistent for petitioner to successfully carry on an extensive legal practice, and yet be incompetent to file correct returns, since petitioner "would be incompetent in any area except the area he was obsessive in, namely, work" (A. 185).

To rebut the insanity defense, the Government offered the testimony of two judges and twelve attorneys (R. 269–292), all of whom had known and observed petitioner for from ten to twenty-five years. The Court of Appeals summarized their testimony in this way (Pet. App. 14):

> The Government testimony, of the judges and lawyers, was to the effect that Cain handled himself very well between the years 1954

and 1960; showed "sharp judgment and thought" in cross-examination; was "very definitely" capable of computing special damages in injury cases; "courtroom pressure" did not affect him; and was capable of handling himself in any situation. There was testimony that he defended murder and other criminal cases.

In addition, petitioner took the stand and testified on direct examination as follows:

> I know the difference between right and wrong and think I always have. I think that I did all during the time involved here. I do not contend that I had any irresistible impulses to defraud the Federal Government on tax matters [A. 214].

Petitioner also testified:

> After receiving this report I consulted Dr. James Hurley who has testified here. I heard the testimony of the doctor yesterday that I did not know the difference between right and wrong. I disagree with that. I have tried cases as recently as last month. When anyone gets through trying a case, someone who watches it may criticize the conduct in which he handled his or herself in the course of the trial. I'm not aware in my own mind of any less ability to conduct a trial in the courtroom than I had 10 years ago.
>
> No one has suggested to me that they noticed any difference except the witness who was here yesterday. I have never heard that before yesterday by any professional person [A. 217–218].

3. In finding petitioners guilty on all counts, Judge Swygert applied the right-wrong, irresistible-impulse test (A. 243–244). He stated that:

> * * * as I understand the test of mental incompetency * * * the test * * * is whether the accused is incapable of knowing the difference between right or wrong—right and wrong—and if he is aware of such difference.
>
> The further test is whether his will and mental state is so weakened by derangement that he is powerless to make a choice between right and wrong; in other words, that he has no control over his conduct with regard to the matter about which he acts.

It was only after clearly stating the applicable test that the trial judge inadvertently used the disjunctive "or" in summarizing the test as:

> If a person can distinguish between right and wrong, or if he is aware of what he is doing and has the mental capacity to choose between a right and a wrong course of action, it is my view that the law requires that he be held responsible for his acts.

Judge Swygert noted that the medical testimony showed Allan Cain to have a "partial organic impairment of the brain * * * and a neurotic personality," (A. 245) but held that the testimony of the judges and lawyers, together with the testimony of petitioner himself, "dispelled any doubt" (A. 247) of petitioner's mental competency.

After discussing the sufficiency of the evidence to establish willfulness (A. 249–250), the court made the following observations with respect to Mrs. Cain (A. 250):

> As to Mrs. Cain, I think, too, looking at it from the standpoint of all the facts here, she was, as Mr. Corry argued, not a housewife who

> didn't know anything about the business; she worked with Mr. Cain, she worked in his office, she contributed to this income and she had the benefit of this income. It was almost a husband and wife enterprise. She wasn't a lawyer, but she was his secretary and she drafted many papers, plus the fact she made out income tax returns, she deposited monies, paid bills and wrote the checks, and it seems to me it was a joint effort from the beginning to the end.

The court of appeals unanimously affirmed, holding that there was no error in the responsibility test applied by the trial court; that the trial court was not bound to accept the expert opinion testimony; and that the evidence sustained the trial court's finding that petitioners wilfully attempted to evade their taxes (Pet. App. 12–16).

ARGUMENT

1. Petitioner Allan C. Cain asserts that the trial court used an erroneous standard, *i.e.*, the right-wrong irresistible-impulse test, in determining his criminal responsibility, and that it is now time for this Court to declare the correct rule in order to resolve the conflict in the various circuits created by the decisions in *Durham* v. *United States*, 214 F. 2d 862 (C.A.D.C.) and *United States* v. *Currens*, 290 F. 2d 751 (C.A. 3d). We respectfully suggest that this is hardly the case in which to decide this question even if the time were considered appropriate.

In the trial court, the question of the proper test to

be applied was apparently not raised by petitioner until after the court had rendered its decision, when petitioner contended that this issue created a substantial question for purposes of obtaining bail pending appeal (A. 265–266). In the court of appeals, petitioner took an ambiguous and somewhat mystifying position. Arguing first that the medical evidence showed him to be incompetent under any standard, petitioner, after noting the various formulations federal courts have applied, declared that the court of appeals need not "determine which school of thought is correct" (Br. 48). Petitioner then proceeded to reiterate his position that the instant case "did not involve the proper tests for legal sanity" (Br. 53), but went on to argue that even if mental competency was proven under the right-wrong, irresistible-impulse test, it was not established under the *Durham* or *Currens* rules (Br. 54). Of course, for the court of appeals to hold that mental incompetency was established under either *Durham* or *Currens* would necessarily have caused the court to either adopt or reject those formulations, or some similar standard, which it was not called upon to do. This being so, the court of appeals, after noting that "[t]he parties agree that we need not discuss the various tests courts have used in deciding insanity issues" (See Pet. App. 12), held that there was no error in the right-wrong, irresistible-impulse test applied by the trial court.

Moreover, even if we assume *arguendo* that the trial court should have applied a different test, it is evident that the court would have reached the same

decision. In denying bail to petitioners pending appeal, the trial court stated (A. 266):

> Under whatever standard the question of competence might be set, it seems to me the facts were so apparent and so overwhelming that Mr. Cain is in no way incompetent, never has been, and that the medical evidence didn't substantiate it, and could and was in no way persuasive, and for that reason, if that is the ground for appeal, I am going to deny bail * * *.

2. Petitioner contends (Pet. 24) that the evidence was insufficient to support the trial court's finding that he was criminally responsible during the prosecution period (1954–57). The main thrust of the argument is that the trial court, on the basis of the medical opinion testimony, was compelled to find that petitioner was insane at the times he filed the understated returns. The short answer to petitioner's claim is that a trier of fact is not bound by expert opinion, even though uncontradicted, and may reject the opinion if in the exercise of its independent judgment the facts are not in accord with that opinion. *Dusky* v. *United States*, 295 F. 2d 743, 754 (C.A. 8th), certiorari denied, 368 U.S. 998; *Holoway* v. *United States*, 148 F. 2d 665 (C.A.D.C.).

This principle is particularly pertinent in the instant case, where the evidence of petitioner's insanity was so inconclusive in nature. As the trial court observed in commenting on the medical testimony (A. 245–246):

> I do not think I should attempt to criticize the testimony of the physicians and the psychologist. I do not feel that I should impugn their sincerity. However I did think and couldn't

help but believe that it was rather incredible in the way they attempted to isolate the particular conduct about which they testified regarding the defendant's tax matters, and attempted to persuade the Court that that was [the] only manifestation of a mental incompetency.

I don't want to use the word "preposterous", but that seemed to be the only word I could think of when I considered all the facts in this case on this issue in relation to their testimony.

3. There is no merit in the assertion of petitioner Margaret S. Cain (Pet. 25) that a conflict exists between the decision in the instant case and those in *Stirone* v. *United States*, 361 U.S. 212, and *Poonian* v. *United States*, 294 F. 2d 74 (C.A. 9th). In *Stirone*, the defendant was convicted of a crime with which he was not charged; in *Poonian* the defendant was charged with a crime which the evidence showed he did not commit. In the instant case, Mrs. Cain was convicted of the crime with which she was charged in the indictment and, as shown by the statement above, the evidence was plainly sufficient to sustain the verdict. That the income was not proved to belong to "her" is irrelevant. Aside from the fact that the liability with respect to a joint return is "joint and several" (see Section 51(b) of the Internal Revenue Code of 1939 and Section 6013(d) of the Internal Revenue Code of 1954), it is clear that no one is "exempt from punishment * * * who actively endeavors to defeat a tax," *United States* v. *Troy*, 293 U.S. 58, 62 or who "contributed consciously to furthering that illicit enterprise." *United States* v. *Johnson*, 319 U.S. 503, 515.

CONCLUSION

Further review by this Court is unwarranted. For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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